

ORIGINAL

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**FILED**  
Clerk  
District Court

**JAN 17 2006**

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For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

Attorney for Plaintiff  
Rosario DLG Kumagai

IN THE UNITED STATES DISTRICT COURT  
FOR  
THE NORTHERN MARIANA ISLANDS

ROSARIO DLG KUMAGAI, ] CIVIL ACTION NO. 05-0037

Plaintiff, ]

vs. ]

PAMELA BROWN, a.k.a. PAMELA  
BROWN BLACKBURN, personally  
and in her official capacity as the  
Attorney General for the  
Commonwealth of the Northern  
Mariana Islands;  
FERMIN M. ATALIG, personally  
and in his official capacity as the  
Secretary of Finance,  
COMMONWEALTH OF THE  
NORTHERN MARIANA ISLANDS;  
MARIA LOURDES SEMAN ADA,  
personally and in her official capacity  
as the Executive Director for the  
Commonwealth  
Development Authority;  
COMMONWEALTH DEVELOPMENT  
AUTHORITY;  
BANK OF GUAM;  
and JOHN DOES ONE thru TEN,

PLAINTIFF'S OPPOSITION TO MOTION  
TO DISMISS BY DEFENDANTS CDA  
AND MARIA LOURDES S. ADA

Dated: February 9<sup>th</sup>, 2006  
Time: 9:00 a.m.  
Judge: Hon. Alex R. Munson  
Chief Judge

Defendants. ]

COMES NOW ROSARIO DLG KUMAGAI, as Plaintiff herein, by and through her  
Counsel, Brien Sers Nicholas, Attorney at Law, and oppose the motion to dismiss  
having been filed in this case by Defendants Commonwealth Development Authority  
["CDA"] and Maria Lourdes S. Ada ["Ada"]. In support of the foregoing opposition,

1 Plaintiff states and argues the following:

2 **STANDARD FOR A RULE 12(b)(6) and 56 MOTIONS:**

3 Rule 12(b) of the Federal Rules of Civil Procedure, in relevant parts, states the  
4 following:

5 Every defense, in law or fact, to a claim for relief in any  
6 pleading, whether a claim, counterclaim, cross-claim, or  
7 third-party claim, shall be asserted in the responsive  
8 pleading thereto if one is required, except that the following  
9 defenses may at the option of the pleader be made by  
10 motion: . . . (6) failure to state a claim upon which relief can  
11 be granted[.] . . . If, on a motion asserting the defense  
12 numbered (6) to dismiss for failure of the pleading to state  
13 a claim upon which relief can be granted, matters outside  
14 the pleading are presented to and not excluded by the court,  
15 the motion shall be treated as one for summary judgment  
16 and disposed of as provided in Rule 56[.]

12 See Fed. R. Civ. Pro. 12(b)(6).

13 Rule 56(c) of the Federal Rules of Civil Procedure, on the other hand, states the  
14 following:

15 The motion shall be served at least 10 days before the time  
16 fixed for the hearing. The adverse party prior to the day of  
17 hearing may serve opposing affidavits. The judgment sought  
18 shall be rendered forthwith if the pleadings, depositions,  
19 answers to interrogatories, and admissions on file, together  
20 with the affidavits, if any, show that there is no genuine  
21 issue as to any material fact and that the moving party is  
22 entitled to a judgment as a matter of law. A summary  
23 judgment, interlocutory in character, may be rendered on  
24 the issue of liability alone although there is a genuine issue  
25 as to the amount of damages.

21 See Fed. R. Civ. Pro. 56(c).

23 This Honorable Court, in considering a Rule 12(b)(6) motion, is required to  
24 accept all allegations of material facts as true and construe them in the light most  
25 favorable to Plaintiff. See Argabright v. United States, 35 F.3d 474 (474) (9<sup>th</sup> Cir.  
26 1994). However, if matters outside of the pleadings are presented to and not  
27 excluded by the court, the motion shall be treated as one for summary judgment and  
28 disposed of as provided in Rule 56. See Fed. R. Civ. Pro. 12(b)(6). Pursuant to Rule

1 56(c), summary judgment is appropriate if there is no genuine issue as to any material  
2 fact and the moving party is therefore entitled to judgment as a matter of law. See  
3 Id.; see also Chung v. World Corporation, Case No. CV-04-0001-ARM, Order on Cross-  
4 Motions for Summary Judgment (NMI Dist. Ct. June 22<sup>nd</sup>, 2005); citing Celotex Corp.  
5 v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment,  
6 the court must take the responding party's evidence as true and all inferences are to  
7 be drawn in its favor. See Chung at 3; citing Eisenberg v. Insurance Co. of North  
8 America, 815 F.2nd 1285, 1288 (9<sup>th</sup> Cir. 1987). Summary judgment is therefore not  
9 appropriate "where contradictory inferences may reasonably be drawn from undisputed  
10 evidentiary facts . . ." See Chung at 3; citing Hollingsworth Solderless Terminal Co.  
11 v. Turley, 622 F.2nd 1324, 1335 (9<sup>th</sup> Cir. 1980).

12 As would be seen below, based on the relevant laws and the facts of this case,  
13 Defendants CDA and Ada are not entitled to have a dismissal of Plaintiff's complaint  
14 against them nor is summary judgment warranted as well. Accordingly, their motion  
15 herein must be denied.

#### 17 **STATEMENT OF FACTS:**

18 Plaintiff, in her complaint, asserts seven (7) causes of actions against  
19 Defendants CDA and Ada, i.e., Count I (violation of her due process and equal  
20 protection rights under 42 U.S.C. § 1983), Count II (conspiracy in violation of 42  
21 U.S.C. § 1983), Count III (common law conspiracy), Count VII (intentional interference  
22 with contractual rights--MPLA settlement agreement), Count VIII (intentional  
23 interference with economic relations--MPLA settlement agreement), Count X  
24 (intentional infliction of emotional distress) and Count XI (negligent infliction of  
25 emotional distress). In support of the foregoing causes of actions against Defendants  
26 CDA and Ada, Plaintiff alleged specific facts (including exhibits) in her complaint as  
27 follows:  
28

1           a.     **Count I (violation of her due process and equal protection rights under 42**  
 2                 **U.S.C. § 1983):**

3           In her complaint, Plaintiff alleges that she had rights, privileges, and immunities  
 4           under the due process and equal protection clauses of the Federal and NMI  
 5           constitutions, including her right not be deprived of her constitutionally protected  
 6           interest in her property, i.e., U.S. Const. Amend. 5 & 14; NMI Const. Art. 1, §§ 5 &  
 7           6. See Plaintiff's Complaint, ¶ 42.<sup>1</sup> Plaintiff also alleged that Defendants CDA and  
 8           ADA, at all times, were state actors and that their conducts were subject to 42 U.S.C.  
 9           §§ 1983. See Plaintiff's Complaint, ¶ 43.

10          Plaintiff, in further support of her claim, alleged that acting under the color of  
 11          law, Defendants CDA and ADA denied her rights, privileges, or immunities secured to  
 12          her by the Constitutions of the United States and the Northern Mariana Islands and  
 13          also by Federal and NMI laws as guaranteed by the Fourth, Fifth, and Fourteenth  
 14          Amendments to the Constitution of the United States and Article 1, §§ 5 and 6 of the  
 15          NMI Constitution. Specifically, Defendants CDA and Ada (a) refused and prevented  
 16          the release of Plaintiff's Requisition No. FY 05-11 that would have resulted in Plaintiff  
 17          getting her land compensation;<sup>2</sup> (b) refused and continued to prevent the release of  
 18          the funds to compensate Plaintiff, in light of their knowledge and actions in having  
 19          allowed certain wetland Owners similarly situated as that of Plaintiff to be fully  
 20          compensated for the taking of their wetland properties no different then that of  
 21          Plaintiff;<sup>3</sup> (c) by allowing and permitting another wetland Owner similarly situated as  
 22          that of Plaintiff to be again fully compensated for the taking of her wetland property  
 23          no different then that of Plaintiff while the lawsuit against Plaintiff was still pending

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24                 <sup>1</sup>     The "property" in question in this case is Plaintiff's land compensation as  
 25                 evidenced by her settlement agreement with the Marianas Public Lands Authority ["MPLA"]  
 26                 and also with Defendant CNMI in CNMI, DPHEs v. Rosario DLG Kumagai, Civil Action  
 27                 No. 05-0149C ["CHC Lawsuit"]. See Plaintiff's Complaint, Exhibits "D" & "I."

27                 <sup>2</sup>     See Plaintiff's Complaint, ¶¶ 32 through 34; see also Exhibits "O," "P" & "Q."

28                 <sup>3</sup>     See Plaintiff's Complaint, ¶ 39; see also Exhibits "V" through "CC."

1 with the CNMI Superior Court.<sup>4</sup> See Plaintiff's Complaint, ¶ 44.

2 Clearly, by the foregoing allegations, Plaintiff has stated a claim under 42 U.S.C.  
3 § 1983 as against Defendants CDA and Ada.

4 **b. Count II (conspiracy in violation of 42 U.S.C. § 1985(3)):**

5 Plaintiff, based on the actions taken against her by Defendants Pamela Brown  
6 ["Brown"] and Fermin M. Atalig ["Atalig"], and Bank of Guam ["BOG"] also alleged  
7 conspiracy against Defendants CDA and Ada pursuant to 42 U.S.C. § 1985(3). In  
8 support of the foregoing claim, Plaintiff sets forth in her complaint the following:

9 The conspiratorial purpose by Defendants CDA and Ada, along with Defendants  
10 Brown, Atalig, and BOG was to deny Plaintiff her land compensation, i.e., her property.  
11 See Plaintiff's Complaint, ¶ 48. In further support of the foregoing claim, Plaintiff  
12 alleged that the overt acts taken against her were (1) Defendant Brown instructing  
13 Defendant Atalig not to concur with Plaintiff's requisition [i.e., FY 05-11], (2)  
14 Defendant Brown instructing Lemons to sign-off and forward a letter to Defendant  
15 Atalig telling him not to concur with Plaintiff's requisition;<sup>5</sup> (3) Defendant Brown filing  
16 of an otherwise frivolous lawsuit before the CNMI Superior Court caption as CNMI ex  
17 rel Pamela Brown, Attorney General, v. MPLA, et. al., Civil Action No. 05-0332E [the  
18 "MPLA Lawsuit"];<sup>6</sup> (4) Defendant Brown instructing and Defendants CDA and Ada  
19 agreeing with Defendant Brown not to process Plaintiff's land compensation, i.e.,  
20 Requisition No. FY 05-11.<sup>7</sup> See Plaintiff's Complaint, ¶ 49. As for Defendants CDA  
21 and Ada, they joined in and became part of the conspiracy when they agreed to and  
22 consented to stop the processing of Plaintiff's Requisition No. FY 05-11 that would  
23 have resulted in Plaintiff finally receiving her long-overdue land compensation in this

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24  
25 <sup>4</sup> See Plaintiff's Complaint, ¶ 40; see also Exhibit "DD."

26 <sup>5</sup> See Plaintiff's Complaint, ¶ 29; see also Exhibit "L."

27 <sup>6</sup> See Plaintiff's Complaint, ¶¶ 30 and 38; see also Exhibit "U."

28 <sup>7</sup> See Plaintiff's Complaint, ¶ 34 ; see also Exhibit "P."

1 case for the taking of her property.<sup>8</sup> See Plaintiff's Complaint, ¶ 50.

2 Plaintiff, in further support of the foregoing claim, also alleged that she was,  
3 at all times relevant herein, a part of a class of persons entitled to have the taking of  
4 her property compensated by Defendant CNMI as provided for under the Federal and  
5 CNMI constitutions, as well as under the CNMI PL 13-17, as amended by CNMI PL  
6 14-29. See Plaintiff's Complaint, ¶ 51.

7 Once again, Plaintiff has alleged facts in her complaint to support her § 1985(3)  
8 claim in this case.

9 **c. Count III (common law conspiracy):**

10 In her complaint, Plaintiff alleges that Defendants CDA and Ada (along with  
11 Defendants Brown, Atalig and BOG), based on the facts of this case, (a) all had an  
12 object to be accomplished; (b) had an agreement to the object or course of action, to  
13 wit: to deprive Plaintiff of her rights under the constitutions and laws of the United  
14 States and the CNMI; (c) performed one or more unlawful overt acts; and (d) caused  
15 Plaintiff damages that were a direct result of those acts, all herein alleged. See  
16 Plaintiff's Complaint, ¶ 54. In furtherance of their object, Plaintiff alleges that all the  
17 conspirators (including Defendants CDA and Ada) did two or more overt acts against  
18 Plaintiff. These overt acts included, but were not limited to, the facts outlined in  
19 Count II, supra, conspiracy under § 1985(3). See Plaintiff's Complaint, ¶ 55.

20 The same facts herein-discussed and alleged by Plaintiff in support of her §  
21 1985(3) are the same facts which supports Plaintiff's claim for common law  
22 conspiracy in this case. Again, this facts are more than sufficient to support Plaintiff's  
23 common law conspiracy in this case.

24 **d. Count VII (intentional interference with contractual rights--MPLA  
25 settlement agreement):**

26 Plaintiff, in support of this particular claim, alleged that Defendants CDA and  
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28 <sup>8</sup> See Plaintiff's Complaint, ¶ 34; see also Exhibit "Q."

1 ADA knew or should have known that Plaintiff and MPLA had between them a legally  
 2 binding and enforceable contract in the form of a settlement agreement, to wit: the  
 3 MPLA Settlement Agreement.<sup>9</sup> See Plaintiff's Complaint, ¶ 76. Plaintiff further  
 4 alleged that, in light of the foregoing knowledge by Defendants CDA and Ada, said  
 5 Defendants (by their actions) intentionally and maliciously took actions alleged herein  
 6 that interfered with said MPLA Settlement Agreement and aimed at further denying  
 7 Plaintiff her rights under said settlement agreement to the receipt of her land  
 8 compensation. See Plaintiff's Complaint, ¶ 77. The actions taken by Defendants CDA  
 9 and Ada have already been discussed herein vis a vis by agreeing and consenting to  
 10 the stoppage of Plaintiff's land compensation from being processed. Id. What is most  
 11 disturbing is the fact that Defendants CDA and Ada knew or should have known that  
 12 their actions in this regards were illegal. See Plaintiff's Complaint, ¶¶ 36 & 78.

13 Once again, Plaintiff in this case has alleged sufficient facts to support her claim  
 14 of contractual interference by Defendants CDA and Ada in this case. As would be  
 15 seen below, these facts are undisputed and, therefore, as a matter of law, Plaintiff is  
 16 entitled to judgment against Defendants CDA and Ada in this case as to this particular  
 17 claim.

18 **e. Count VIII (intentional interference with economic relations–MPLA**  
 19 **settlement agreement):**

20 Similar to her claim for contractual interference, Plaintiff also alleged against  
 21 Defendant CDA and Ada a claim for interference of an economic relations as between  
 22 Plaintiff and MPLA. As a result of the MPLA settlement agreement, said Defendants

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23  
 24 <sup>9</sup> See Plaintiff's Complaint, Exhibit "D." It is also worth noting that, given the  
 25 involvement of Defendants CDA and Ada in the disbursement process and, further, given that  
 26 Plaintiff's Requisition No. 05-11 is not the first requisition that MPLA had forwarded to  
 27 Defendants CDA and Ada, said Defendants cannot now claim not to have known about the  
 28 settlement agreement between MPLA and Plaintiff in this case. In other words, but for the  
 withholding and the subsequent lawsuit against Plaintiff by Defendants CNMI and Brown,  
 Plaintiff's Requisition No. 05-11 followed the same disbursement process that other similarly  
 situated wetland owners had followed earlier than Plaintiff and which resulted in them getting  
 their compensation process accordingly by Defendants CDA and Ada.



1 CDA and Ada knew or should have known that Plaintiff and MPLA had between  
2 themselves an economic relation protected by law. See Plaintiff's Complaint, ¶ 81.  
3 In light of this knowledge, Defendants CDA and Ada (by their actions) intentionally and  
4 maliciously took actions that interfered with said economic relations between Plaintiff  
5 and MPLA. See Plaintiff's Complaint, ¶ 82. Again, as already discussed herein, the  
6 actions taken by Defendants CDA and Ada resulted in Plaintiff not receiving her land  
7 compensation as agreed to in this case. Id.

8 **f. Count X (intentional infliction of emotional distress):**

9 Plaintiff, in support of the foregoing claim alleged that Defendants CDA and Ada  
10 took actions intentionally and deliberately which inflicted emotional distress on  
11 Plaintiff. These actions included but were not limited to interfering with her civil,  
12 statutory and contractual rights as herein alleged. See Plaintiff's Complaint, ¶ 91. As  
13 already discussed above, Plaintiff had a right to her property, i.e., her land  
14 compensation, which was denied her by said Defendants CDA and Ada. Id. The  
15 actions and conducts of said Defendants CDA and Ada were extreme and outrageous,  
16 beyond any and all possible bounds of decency and utterly intolerable in a civilized  
17 community. See Plaintiff's Complaint, ¶ 92. The foregoing is particularly so given  
18 that said Defendants CDA and Ada had previously allowed similarly situated wetland  
19 owners to be fully compensated without any actions taken against them to deny them  
20 their land compensation, i.e., their properties. See Plaintiff's Complaint, ¶ 39. To  
21 further show just how "extreme and outrageous" the actions and conducts of  
22 Defendants CDA and Ada in this case were, Plaintiff also alleged that while defending  
23 her rights in the MPLA Lawsuit before the CNMI Superior Court [which was still  
24 pending at the time], Defendants CDA and Ada permitted and allowed another similarly  
25 situated wetland owner no different then Plaintiff to be fully compensated without any  
26 interference from said Defendants. See Plaintiff's Complaint, ¶ 40.





single most important factor in determining whether an entity is an arm of the state.” Citing Doe v. Lawrence Livermore Nat. Laboratory, 65 F.3d 771, 774-76 (9<sup>th</sup> Cir. 1995), *rev. on other grounds*, Regents of the University of California v. Doe, \_\_\_\_ U.S. \_\_\_\_, 117 S. Ct. 900, 904 (1997). In concluding that NMC was not an arm of the state, this Honorable Court noted the fact that NMC relies on the CNMI for its budget, not to mention also that NMC is often represented in its legal affairs by the Commonwealth Attorney General’s Office. See Oden at 8. Defendant CDA, on the other hand, does not rely on any appropriations of the general funds from the CNMI legislature for its budget. See 4 CMC § 10401. In fact, on budgetary issues, Defendant CDA is only required to submit its annual budget to the CNMI Governor and the Legislature “for informational purposes” only. See 4 CMC § 10402(f). On the issue of legal representation, Defendant CDA is represented in its legal affairs by its own legal counsels and not the CNMI Attorney General’s Office.

In all, Defendant CDA [unlike NMC] is not an “arm of the state” for purposes of liability and, therefore, it can be sued for the same under § 1983. Defendant Ada, as an employee and an agent of Defendant CDA, is therefore open to monetary damages in her official capacity as well. Given that Defendant CDA has its own funds separate and apart from the funds of the CNMI, any potential monetary damages in this case will clearly be paid out of Defendant CDA’s own funds. This is not the case with NMC. As indicated in Oden, whatever monetary damages that could have been awarded in that case against NMC would have clearly been paid out of funds appropriated to NMC by the CNMI. Such is not the case here with Defendant CDA.

**B. Plaintiff’s Due Process Rights Have Not Been Violated:<sup>10</sup>**

Defendant CDA and Ada argues that Plaintiff has no property interest in

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<sup>10</sup> Defendants CDA and Ada only addressed Plaintiff’s due process claim under § 1983 in their motion to dismiss but not Plaintiff’s claim of equal protection. Accordingly, Plaintiff will only address said Defendants arguments seeking dismissal of her due process claim in the foregoing opposition.

1 the "bond project fund" and, therefore, has failed to demonstrate that there has been  
2 a deprivation of the same by said Defendants. See Motion to Dismiss, pgs. 3 to 8.<sup>11</sup>

3 As would be seen below, Plaintiff has alleged a "property interest" in the  
4 "bond project fund" and has demonstrated that Defendants CDA and Ada deprived her  
5 of the same in violation of her due process rights.

6 **1. Plaintiff Has No Cognizable Property Interest in The Bond Project**  
7 **Fund Held in Trust by Bank of Guam.**

8 First and foremost, the so-called "bond project fund" is none other  
9 then the very same "funds" which were raised through the sale of bonds pursuant to  
10 CNMI P.L. 13-17, as amended by CNMI P.L. 14-29. See Attachments "A" & "B,"  
11 *respectively*;<sup>12</sup> see also §§ 3.01(c) & 3.02, Exhibit "1," Motion to Dismiss. Under  
12 CNMI P.L. 13-17, this so-called "bond project fund" is referred to as the "Land  
13 Compensation Fund ['Fund']." See CNMI P.L. 13-17, § 4(a). Said public law made  
14 it very clear that "[t]he purpose of the Fund shall be to pay principal and interest on  
15 any financing entered into by the Marianas Public Lands Authority for the financing of  
16 the retirement of land compensation claims against the Commonwealth as authorized  
17 by this Act." See CNMI P.L. 13-17, § 4(b). Plaintiff's claim in this case is for land  
18 compensation as a result of her property having been taken by the CNMI. CNMI P.L.  
19 13-17, as amended by CNMI P.L. 14-29, were passed to address this very issue by  
20 making available funds to be used to compensate a land owner such as Plaintiff herein.  
21 Given, again, that the so-called "bond project fund" is the same as that of the "Land  
22 Compensation Fund" provided for under CNMI P.L. 13-17, Plaintiff has an interest in  
23 said funds. In fact, all land compensation claims that Defendants CDA and Ada had  
24 authorized prior to and after Plaintiff's claim, were all paid out of this so-called "bond

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25  
26 <sup>11</sup> The motion to dismiss referred to herein is the motion to dismiss filed by  
27 Defendants CDA and Ada in this case on December 29<sup>th</sup>, 2005.

28 <sup>12</sup> For ease of reference, copies of said CNMI P.L. 13-17 and P.L. 14-29 are  
attached hereto as Attachments "A" & "B."

1 project fund," i.e., "Land Compensation Fund," being held by BOG in trust. See  
2 Plaintiff's Complaint, Exhibits "V" through "DD-6."

3 In all, the undisputed facts of this case clearly shows that Plaintiff had entered  
4 into a settlement agreement [i.e., MPLA Settlement Agreement] with MPLA for her  
5 to finally receive her land compensation as a result of the taking of her property by the  
6 CNMI. See Plaintiff's Complaint, Exhibit "D." In said settlement agreement, it is  
7 specifically noted that Plaintiff's land compensation was to be paid pursuant to CNMI  
8 P.L. 13-17, as amended. Id. Accordingly, Plaintiff has alleged a "property interest"  
9 in this case. To the extent that Defendants CDA and Ada are now attempting to argue  
10 that the Indenture Agreement with BOG is superior to CNMI P.L. 13-17, as amended  
11 by CNMI P.L. 14-29, this argument must be rejected. The fact of the matter is that  
12 Plaintiff's claim is based, among others, on CNMI P.L. 13-17, as amended by CNMI  
13 P.L. 14-29. Thus, again, to the extent that the Indenture Agreement is contrary to  
14 said CNMI P.L. 13-17, as amended by CNMI P.L. 14-29, the Indenture Agreement  
15 must fail.

16 Furthermore, as would be discussed below, Defendants CDA and Ada cannot  
17 incorporate into the Indenture Agreement additional powers that were not granted to  
18 them by CNMI P.L. 13-17, as amended by CNMI P.L. 14-29.

19 **2. Plaintiff Has Not Demonstrated That There Has Been a Deprivation**  
20 **of a Property Interest:**

21 This argument is premised on the previous argument by Defendants  
22 CDA and Ada that Plaintiff has no "property interest" in the "bond project funds"  
23 above discussed. Given the above-discussion, Plaintiff has clearly established that she  
24 does have a legally protected "property interest" in this case.

25 Defendants CDA and Ada, in further support of this particularly  
26 argument, state that Plaintiff cannot point to any written document that unequivocally  
27 states when she is to receive payment for her land compensation. As such,  
28 Defendants CDA and Ada further argue that "the complaint is also devoid of any

1 allegation as to when MPLA was supposed to pay Plaintiff.” See Motion to Dismiss,  
 2 pg. 6, Lines 12-14. The foregoing arguments, respectfully, side-step the real issue in  
 3 this case. The real issue is not when Plaintiff was going to be paid by MPLA but,  
 4 rather, what Defendants CDA and Ada did when so instructed by MPLA to inform BOG  
 5 to release the funds necessary to compensated Plaintiff in this case. See Plaintiff’s  
 6 Complaint, Exhibit “N.” It is the actions of Defendants CDA and Ada in refusing to  
 7 process her land compensation claim when so instructed by MPLA that Plaintiff is  
 8 alleging deprived her of the same.

9 Defendants CDA and Ada knew very well that, at all times relevant  
 10 herein and contrary to the Indenture Agreement, they and each of them had no right  
 11 to interfere with the processing and disbursement of Plaintiff’s land compensation as  
 12 a matter of law. See CNMI P.L. 13-17; see also CNMI P.L. 14-29. Section 4(c) of  
 13 CNMI P.L. 13-17 specifically states that “[t]he Commissioner of the Marianas Public  
 14 Lands Authority shall have expenditure authority over the Fund, subject to approval of  
 15 claims by the Board.” See CNMI P.L. 13-17, § 4(c); see also CNMI P.L. 14-29, § 1(c)  
 16 (“The Commissioner of MPLA shall have expenditure authority over the funds in the  
 17 account<sup>13</sup> subject to approval of claims by the Board.” CNMI P.L. 14-29 goes on to  
 18 further state that “[s]uch funds shall be drawn down from the trustee based upon  
 19 procedures established by the MPLA Board and upon the concurrence of the Secretary  
 20 of Finance.” See CNMI P.L. 14-29, § 1(c). No where in the foregoing sections of  
 21 CNMI P.L. 13-17 or P.L.14-29 was Defendant CDA and/or Ada given any legal  
 22 authority to do what they did in this case, much less be part of the expenditure and  
 23 disbursement process. Consistent with CNMI P.L. 14-29, above cited, MPLA did  
 24 entered into a “disbursement procedures” with the Secretary of Finance, i.e.,  
 25 Defendant Fermin M. Atalig [Defendant Atalig]. See Plaintiff’s Complaint, Exhibit  
 26  
 27

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28 <sup>13</sup>

The account referred to as the trust account being held by BOG.

1 "C."<sup>14</sup> Again, no where in the disbursement procedures was Defendants CDA and/or  
 2 Ada made a part of the process. Given the foregoing, the attempt in the Indenture  
 3 Agreement to have Defendants CDA and/or Ada play a role in the disbursement  
 4 process must give way to the clear mandate of CNMI P.L. 13-17, as amended by  
 5 CNMI P.L. 14-29, herein cited.

6 Defendants CDA and Ada goes on to note a letter from CNMI  
 7 Assistant Attorney General Clyde Lemons, Jr. to Defendant Atalig on May 9<sup>th</sup>, 2005  
 8 which instructed Secretary Atalig not to process Plaintiff's requisition. See Motion to  
 9 Dismiss, pg. 6, Lines 19 to 22, and pg. 7. Line 1; see also Plaintiff's Complaint,  
 10 Exhibit "L." In said letter, the CNMI Office of Attorney General talks about taking legal  
 11 actions against Plaintiff and another landowner, namely Mrs. Victoria S. Nicholas  
 12 ["Mrs. Nicholas"]<sup>15</sup> About three (3) months later, the CNMI Office of the Attorney  
 13 General did file a lawsuit in the CNMI Superior Court against Plaintiff and Mrs. Nicholas  
 14 wherein the only claim made was that the land compensation claims for Plaintiff and  
 15 Mrs. Nicholas were void because their properties were not taken in connection with  
 16 any right of ways. See Plaintiff's Complaint, ¶ 35 (Exhibit "R").<sup>16</sup> The CNMI Office  
 17 of the Attorney General made this frivolous claim knowing full well that, as mentioned  
 18 earlier, it had allowed similar compensation to go through prior to that of Plaintiffs and  
 19

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20 <sup>14</sup> It is again worthy to note that Exhibit "C" [Agreement on Land Compensation  
 21 Drawdown and Disbursement Procedures"] was negotiated with Defendant Atalig who was  
 22 being represented by the CNMI Office of the Attorney General and was signed-off by  
 Defendant Pamela Brown as the Attorney General.

23 <sup>15</sup> The letter was written all the while the Office of the Attorney General and  
 24 Defendant Atalig knew very well that they had previously allowed similarly situated wetland  
 25 owners as that of Plaintiff to be fully compensated. Defendant CDA and Ada participated in  
 26 the foregoing by allowing the processing of these wetland owners' compensation from the  
 very same funds that are being held by BOG in trust pursuant to CNMI P.L. 13-17, as  
 amended by CNMI P.L. 14-29.

27 <sup>16</sup> In her letter to Defendants CDA and Ada, Defendant Brown further supported  
 28 her actions in this case by making a claim that the wetland properties for Plaintiff and Mrs.  
 Nicholas were worthless. See Plaintiff's Complaint, ¶ 34 (Exhibit "P").

1 Mrs. Nicholas are being sued. Additionally and as further evidence of the wrong-  
2 doings committed in this case against Plaintiff, the same CNMI Office of the Attorney  
3 General allowed another wetland owner, again, similarly situated as that of Plaintiff  
4 and Mrs. Nicholas, to be compensated without any interference or lawsuits being filed  
5 against said wetland owner to prevent her compensation. This occurred during the  
6 pendency of the lawsuit against Plaintiff and Mrs. Nicholas before the CNMI Superior  
7 Court. See Plaintiff's Complaint, ¶ 40 (Exhibits "DD"). Defendants CDA and Ada  
8 were part of each of the foregoing disbursements and compensations except that,  
9 when it came to Plaintiff and Mrs. Nicholas, said Defendants decided otherwise.

10 Plaintiff, to sustain her § 1983 claim in this case, must show "(1) that the  
11 conduct complained of was committed by a person acting under color of state law;  
12 and (2) that [such] conduct deprived the plaintiff of a federal constitutional or statutory  
13 right." See Wood v. Ostrander, 879 F.2d 583, 587 (9<sup>th</sup> Cir. 1989), *cert. denied*, 498  
14 U.S. 938 (1990). Here, it is undisputed that Defendant CDA and Ada acted "under  
15 color of state law" vis a vis the Indenture Agreement that came about as a result of  
16 CNMI P.L. 13-17, as amended by CNMI P.L. 14-29. Further, as discussed above,  
17 Plaintiff does have a federally protected constitutional right in this case vis a vis her  
18 land compensation claim that came about as a result of her property being taken by  
19 CNMI. See U.S. Const. Amend. V; see also U.S. Const. Amend. IV.

20 The Fourteenth Amendment provides , in part, that no State shall  
21 "deprive any person of life, liberty, or property, without due process of law." See U.S.  
22 Const. Amend. XIV. The United States Supreme Court has made it clear that "[t]he  
23 touchstone of due process is protection of the individual against arbitrary action of  
24 government." See Daniels v. Williams, 474 U.S. 327, 331 (1986); see also Logan v.  
25 Zimmerman Brush Co., 455 U.S. 422 (1981) (a federal interest remains in "protecting  
26 the individual citizen from state action that is wholly arbitrary or irrational.").

27 In the present case, Plaintiff has alleged specific facts to support  
28 her claim that the conducts of Defendants CDA and Ada in denying her land



1 compensation claim were wholly arbitrary and irrational, particularly in light of having  
2 allowed payments of other similarly situated wetland owners to go through.

3 **C. Suit Against Ada for Individual Liability is Barred by Qualified Immunity:**

4 Defendant Ada, in her motion, correctly states the general rule on  
5 qualified immunity. That is, in order to be entitled to qualified immunity, a public  
6 official must show that his or her discretionary conduct did not violate any clearly  
7 established rights of which a reasonable person should have known. See Harlow v.  
8 Fitzgerald, 457 U.S. 800, 818 (1982). However, a public official is not entitled to  
9 qualified immunity when the contours of the right are sufficiently clear that a  
10 reasonable official would understand that what he or she is doing violates that right.  
11 See Anderson v. Creighton, 483 U.S. 635 (1987); see also Allen v. Sakai, 48 F.3rd  
12 1082, 1087 (9<sup>th</sup> Cir. 1994).

13 As already alluded above, Defendant Ada had no discretion to interfere with the  
14 disbursement process in this case as a matter of law. See CNMI P.L. 13-17; see also  
15 CNMI P.L. 14-29. It is also beyond any dispute that the contours of Plaintiff's due  
16 process right, in light of the facts of this case, should have been reasonably clear to  
17 Defendant Ada at the time she stopped the processing of Plaintiff's requisition in this  
18 case. This could not be more evident given that she had earlier processed similar  
19 claims, not to mention processing a similar claim while the lawsuit against Plaintiff was  
20 still pending before the CNMI Superior Court, as herein mentioned. To justify her  
21 actions, Defendant Ada again relies on the Indenture Agreement. However, as above  
22 discussed, this Indenture Agreement cannot transcend CNMI P.L. 13-17, as amended  
23 by CNMI P.L. 14-29. More importantly, Defendant Ada's reliance on the Indenture  
24 Agreement to immunize her conducts in this case cannot thwart § 1983 remedies  
25 available to Plaintiff. See e.g., Howlett v. Rose, 496 U.S. 356, 376-77 (1990) &  
26 Felder v. Casey, 487 U.S. 131, 139 (1988) ("[W]e have held that a state law that  
27 immunizes government conduct otherwise subject to suit under § 1983 is preempted  
28 . . . because the application of the state law would thwart the congressional remedy

1 . . . which of course already provides certain immunities for state officials.”). This is  
 2 also the rule laid-out by the Ninth Circuit. See e.g., Sosa v. Hiraoka, 920 F.2d 1451,  
 3 1460 n. 3 (9<sup>th</sup> Cir. 1990) (noting that the Supreme Court has “held that state law  
 4 immunities have no force against § 1983 suits where the state law immunity purports  
 5 to provide immunity ‘over and above those already provided in § 1983’[.]”).

6 Accordingly, Defendant Ada is not entitled to qualified immunity in this  
 7 case.

8 **D. Count II Fails to State a Claim Upon Which Relief Can be Granted and**  
 9 **Must be Dismissed.**

10 Count II accuses Defendants CDA and Ada of conspiracy pursuant to §  
 11 1985(3). In her complaint, Plaintiff alleges that she was a part of a class of persons  
 12 entitled to be compensated under the Federal and the CNMI constitutions, as well as  
 13 CNMI P.L. 13-17, as amended by CNMI P.L. 14-29. See Plaintiff’s Complaint, ¶ 51.  
 14 Citing Griffin v. Breckenridge, 4-3 U.S. 88 (1970) and Sever v. Alaska Pulp  
 15 Corporation, 978 F.2d 1529 (9<sup>th</sup> Cir. 1992), Defendants CDA and Ada argues that  
 16 Plaintiff has failed to allege that she is a member of any suspect class and, therefore,  
 17 her claim must be dismissed.

18 Plaintiff’s complaint clearly alleges that Plaintiff is a member of a class of  
 19 persons created by CNMI P.L. 13-17, as amended by CNMI P.L. 14-29. Further,  
 20 Plaintiff’s complaint alleges that Defendants CDA and Ada joined in and became part  
 21 of a conspiracy in this case when they, by their own actions, agreed and consented  
 22 to stop Plaintiff’s requisition from being processed in this case. See Plaintiff’s  
 23 Complaint, ¶50. The conspiracy in this case, as alleged by Plaintiff, commenced with  
 24 Defendants Brown and Atalig. See Plaintiff’s Complaint, ¶ 49. What motivated  
 25 Defendant Brown, principally, to have done what she did in this case remains to be  
 26 seen at trial. It is the actions of Defendant Brown, which Defendants CDA and Ada  
 27 agreed to join in, that is the focus of the conspiracy.

28 Thus, given the specific allegations by Plaintiff in this regard, Plaintiff’s

1 complaint viewed in the light most favorable to Plaintiff does state a claim under §  
2 1985(3).

3 **E. Count III Fails to State a Cause of Action Upon Which Relief Can be**  
4 **Granted and Must be Dismissed.**

5 Count III of Plaintiff's Complaint alleges civil conspiracy against  
6 Defendants CDA and Ada, along with the other named-defendants. Similar to her  
7 allegations under Count II, Plaintiff has alleged specific facts to support her civil  
8 conspiracy claim in this case. See Plaintiff's Complaint, ¶¶ 54 and 55. Defendants  
9 CDA and Ada seeks dismissal of this count based on their reliance of I.G.I. General  
10 Contractor & Dev., Ins. v. PSS, et. al., 5 N.M.I. 250 (1999), that there is no written  
11 law in the Commonwealth recognizing the tort of civil conspiracy. While a civil  
12 conspiracy may not be a recognized tort in the Commonwealth, it is recognized under  
13 § 1983.

14 In Adickes v. S.H. Kress & Co., 398 U.S. 144, the Supreme Court stated  
15 that in order to satisfy color of state law requirement under civil conspiracy theory,  
16 plaintiff need only have shown that there was an understanding between civilian and  
17 officers to deprive plaintiff of her rights. Id. 152. There is no questions that Plaintiff's  
18 Complaint contains specific allegations that there was indeed an understanding  
19 between Defendants CDA and Ada, along with Defendants Brown, Atalig, and BOG,  
20 to deprive Plaintiff of her right to her property, i.e., her land compensation. See  
21 Plaintiff's Complaint, ¶¶ 33 & 34.

22 Accordingly and when viewed in light most favorable to Plaintiff, Plaintiff's  
23 Complaint does state a claim for civil conspiracy against Defendants CDA and Ada in  
24 this case.

25 **F. Counts VII and VIII Fail to State a Claim Upon Which Relief Can be**  
26 **Granted:**

27 Counts VII and VIII of Plaintiff's Complaint charges Defendants CDA and  
28 Ada with "intentional interference with contractual rights" and also "intentional  
interference with economic relations" in this case respectively. See Plaintiffs

1 Complaint, ¶¶ 75 through 84. These claims are based on Plaintiff's settlement  
2 agreement with MPLA, i.e., the MPLA Settlement Agreement. See Plaintiff's  
3 Complaint, Exhibit "D." Defendants CDA and Ada seeks a dismissal of the foregoing  
4 based on their earlier claim that Plaintiff has no legitimate claim of interest in the Bond  
5 Project Fund [i.e., the "Land Compensation Fund"] being held by BOG in trust. Again,  
6 as earlier discussed, this argument must fail in light of CNMI P.L. 13-17, as amended  
7 by CNMI P.L. 14-29. See Attachments "A" & "B," *respectively*.

8 Defendants CDA and Ada further argue that Plaintiff has not alleged that  
9 said Defendants acted without justification in withholding the release of her land  
10 compensation. Plaintiff need not allege issues of justification as the same is not an  
11 element of either of the claims herein alleged against Defendants CDA and Ada. See  
12 Hofschneider v. Demapan-Castro, et. al., Civil Action No. 04-523B (CNMI Superior  
13 Court); citing Faulkner v. Ark. Children's Hosp., 347 Ark. 941 (Ark. 2002) (intentional  
14 interference of contractual rights) and Westside Center Associates v. Safeway Stores,  
15 42 Cal. App. 4<sup>th</sup> 507 (Cal. Ct. App. 1996) (intentional interference of economic  
16 relations). Be that as it may, in her complaint, Plaintiff does allege that the actions of  
17 Defendant CDA and Ada were "improper and were all illegal." See Plaintiff's  
18 Complaint, ¶¶ 78 & 83.

19 Lastly, Defendants CDA and Ada claim immunity from suit for Plaintiff's claim  
20 of "interference with contract rights" pursuant to 7 CMC § 2204(b). Again, as earlier  
21 discussed, neither Defendant CDA nor Defendant Ada can be considered an "arm of  
22 the state" for purposes of liability. Additionally, given that at the time of their conduct  
23 alleged herein, the law on "interference with contract rights" was well-established, no  
24 immunity can be bestowed on either of said Defendants to shield them from potential  
25 liability.

26 Again, contrary to the arguments presented by Defendants CDA and Ada,  
27 Plaintiff's Complaint does state a claim for intentional interference with contractual  
28 rights as well as economic relations.

**G. Counts X and XI Fail to State a Claim Upon which Relief Can be Granted.**

Counts X and XI allege "intentional infliction of emotional distress" and also "negligent infliction of emotional distress" against Defendants CDA and Ada. Again, given the above discuss relative to whether or not Defendants CDA and Ada are "arm of the state" for purposes of liability and the conclusion that they are not, neither of them cannot claim an sort of immunity (sovereign or otherwise) in this lawsuit.


Moreover, by specific facts alleged in her complaint, Plaintiff has shown that the actions and conducts of Defendants CDA and Ada in denying what was legally hers on one hand and allowing similarly situated wetland owners to receive their compensation, on the other, cannot be tolerated in a civilized community. Simply put, the actions and conducts of Defendants CDA and Ada towards Plaintiff in this case, in view of their actions and conducts towards others similarly situated as that of Plaintiff, could very well be viewed by the trier of facts to be well beyond any form of decency in a civilized community.

### CONCLUSION:

For all the foregoing reasons herein stated, Plaintiff respectfully ask that this Honorable Court denies the motion to dismiss in this case by Defendants CDA and Ada.

Dated this the 16<sup>th</sup> day of January, 2006.

Respectfully Submitted:

  
Brien Sers Nicholas, Esq.  
Attorney for Plaintiff